UOL FACTORING SDN BHD

v.

CHEY CHING SOON & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
STEVE SHIM J
[CIVIL SUIT NO: D5-22-1465-1997]
27 MAY 1999

CIVIL PROCEDURE: *Pleadings - Amendment of defence - Whether amendment would cause injustice - Whether plaintiff prejudiced*

CIVIL PROCEDURE: *Appeal - Fresh evidence - Rules of the High Court 1980, O. 56 r. 1(3A) - Whether requirements fulfilled*

Greenworld Sdn Bhd assigned invoices payable by the defendants to the plaintiff. Receiving no payment from the defendants for the invoices, the plaintiff commenced an action against the defendants. The plaintiff then filed an application under O. 14 Rules of the High Court 1980 ('RHC') but it was dismissed by the SAR. The plaintiff appealed against the decision. Meanwhile, the defendants filed the instant application seeking an order to admit two affidavits at the hearing of the plaintiff's appeal which were alleged to contain fresh evidence relating to fraud or forgery, and an order to amend the defence.

Held:

[1] The evidence deposed to in the two affidavits was not available at the O. 14 RHC hearing as the affidavits were affirmed after the date on which the decision of the SAR was made. The requirement under O. 56 r. 1(3A)(a) RHC had been satisfied.

[2] The court was satisfied that the evidence deposed to in the two affidavits would, if true, have had a determining influence upon the decision of the SAR. The requirement under O. 56 r. 1(3A)(b) RHC had been satisfied.

[3] The amendment sought would not cause any injustice to the plaintiff. The amendment was necessary as a result of the averment of fraud or forgery and as such would not prejudice the plaintiff.

[Defendants' application allowed.]

Case(s) referred to:

Chai Yen v. Bank of America National Trust & Savings Association [1980] 2 MLJ 142 ***(refd)***

Chiew Soon v. Tay Tai Aun [1990] 1 CLJ 469 ***(refd)***

Langdale & Anor v. Danby [1982] 3 All ER 129 ***(refd)***

Negara Properties Sdn Bhd v. Akitek Bersekutu Malaysia [1996] 2 CLJ 923 ***(refd)***

Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(refd)***

Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd [1983] 1 CLJ 191 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 56 r. 1(3A)(a), (b)

For the plaintiff - WL Tang; M/s KC Yap & Partners

For the defendant - Cheh Chooi Jing (Nor Ashikin Jamaluddin with her); M/s Cheh & Co

Reported by Izzaty Izzuddin

JUDGMENT

Steve Shim J:

This is an application taken out by the defendants in encl. 31 seeking the following reliefs namely (1) an order to admit two affidavits alleged to contain fresh evidence and (2) an order to amend the statement of defence. The application is opposed by the plaintiff.

The chronological events leading to the application may be stated herein. By an agreement dated 13 October 1994, Greenworld Sdn Bhd (Greenworld) assigned invoices payable by the defendants to the plaintiff. Greenworld then gave the defendants notices of assignment *vide* a letter dated 19 October 1994. This was followed by a letter dated 1 November 1994 from the plaintiff giving notice of the assignment of the invoices to the defendants. As a result of alleged non-payment by the defendants, the plaintiff through its solicitors, wrote a letter dated 25 August 1997 to the defendants demanding payment of the sum of RM373,180 as at 31 May 1997 being the outstanding invoices. Receiving no payment, the plaintiff then filed a writ of summons and statement of claim on 31 December 1997. Thereafter, on 6 March 1998, the plaintiff filed an application for summary judgment under O. 14 RHC which was heard and dismissed by the learned Senior Assistant Registrar on 18 September 1998. On the same date, the plaintiff filed a notice of appeal to the judge in chambers. Hearing thereof was fixed on 23 October 1998 but was adjourned to 16 December 1998 and then further adjourned to an uncertain date pending the disposal of the instant application (encl. 31).

In seeking the first relief, the defendants' application is, in essence, to adduce fresh evidence at the hearing of the plaintiff's appeal to the judge in chambers against the decision of the learned Senior Assistant Registrar in dismissing the plaintiff's O. 14 application for summary judgment against the defendants. The fresh evidence is disclosed in two affidavits, one affirmed by Edi Radzman and the other by Soon Yoke Choy.

Now, although an appeal to a judge in chambers operates by way of a rehearing (see *Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716; [1994] 2 MLJ 79, *Chiew Soon @ Chiew Chun Soon v. Tay Tai Aun* [1990] 1 CLJ 469 and *Negara Properties Sdn Bhd v. Akitek Bersekutu Malaysia* [1996] 2 CLJ 923; [1995] 2 MLJ 185), the two affidavits sought to be admitted in this case must comply with O. 56 r. 1(3A) Rules of the High Court 1980 (RHC) which stipulates:

> (3A) At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that –
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> (a) at the hearing before the Registrar the new evidence was not available to the party seeking to use it or that reasonable diligence would not have made it so available; and
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> (b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the Registrar.

In the affidavit affirmed by Edi Radzman on 23 November 1998, the manager of Greenworld, he has deposed, in effect, that on or about October or November 1998, he was able to obtain the consent of the Receiver and Manager of Greenworld to enter into its business premises and whilst therein, he discovered rubber stamps and other stationeries, such as letterheads belonging to other companies including the defendants' firm which the deponent believes, have been used by Greenworld for fraudulent purposes. The other affidavit was affirmed, as I said, by Soon Yoke Choy who incidentally, is one of the defendants in this case. In that affidavit reference is made to an affidavit annexed thereto as an exhibit. This affidavit was actually affirmed by one Fung Foo Fook as a director of Greenworld on 30 September 1998 in another proceeding D6-22-1389-1997. Therein, Fung had deposed that he and/or the other staff of Greenworld had forged the documents such as the invoices and delivery orders. He also admitted that there had been no actual purchases or deliveries of the goods.

It is the defendants' case that the evidence deposed to in the two affidavits was not available at the hearing of the O. 14 application before the learned Senior Assistant Registrar since the alleged fresh evidence relating to the discovery of the rubber stamps and stationeries was deposed to by Edi Radzman in his affidavit affirmed on 23 November 1998 a date after the

decision of the learned Senior Assistant Registrar made on 18 September 1998 and the same applies to the evidence of alleged forgery deposed by Fung Foo Fook in his affidavit affirmed on 30 September 1998.

I think there is substance in that proposition. It would seem therefore that one of the requirements under O. 56 r. 1(3A) RHC that fresh or new evidence was not available to the party seeking to use it has been satisfied. It has to be noted here that counsel for the plaintiff has not submitted on this issue but has instead concentrated on the other requirement under the said O. 56 r. 1(3A) namely whether there was reasonable diligence on the part of the defendants to make the new or fresh evidence available at the hearing of the O. 14 application before the learned Senior Assistant Registrar. In this connection, counsel contends that under O. 56 r. 1(3A), it is incumbent on the defendants to show that the evidence deposed in the two affidavits could not have been obtained with reasonable diligence citing in support that part of the speech by Lord Bridge of Harwich in *Langdale & Anor v. Danby* [1982] 3 All ER 129 which states:

> But I see no injustice at all in requiring a defendant to use such diligence as is reasonable in the circumstances to put before the judge on the hearing of the summons, albeit in summary form, all the evidence he relies on in defence, whereas it would be great injustice to the plaintiff to allow the defendant to introduce for the first time on appeal evidence which was readily available at the hearing of the summons but was not produced.

He further relied on *Chai Yen v. Bank of America National Trust & Savings Association* [1980] 2 MLJ 142 in which the Federal Court had refused an application to introduce fresh evidence on the grounds that the applicant had not shown that the evidence could not have been obtained with reasonable diligence for use at the trial and that the document in question had no relevance whatsoever. He submits that adopting the strict approach enunciated by case authorities, the defendants had failed to show they had exercised due and reasonable diligence to secure evidence deposed to in the two affidavits.

For the defendants, it has been submitted that they had taken all due diligence in attempting to procure the necessary evidence at all material times. According to them, they had written, through their solicitors, to the Receiver and Manager of Greenworld on various occasions for confirmation of the existence of the alleged transaction but had received no response and when eventually they did respond, the defendants were merely told to contact the directors of Greenworld directly which they did but without apparent success. They further allege that Mr. Edi Radzman, a former Manager of Greenworld was able to obtain permission from Greenworlds's

Receiver and Manager to enter the premises and upon entry, according to him, he found the incriminating items such as rubber stamps and stationeries belonging to other companies including the defendant company Eastern Aire Trading Company.

In summary therefore, having regard to the relevant affidavits as well as the written submissions tendered by counsels for the parties concerned and for the reasons stated, I am of the view that the defendants have satisfied the pre-requisites provided in O. 56 r. 1(3A)(a) RHC.

This brings me to the other requirement in O. 56 r. 1 3A(b) RHC which provides that the fresh evidence, if true, would have had or would have likely to have had a determining influence upon the decision of the registrar. In the instant case, the fresh evidence has been deposed in the two affidavits, one affirmed by Edi Radzman bin Sulaiman which relates to the alleged discovery of certain incriminating items which included rubber stamps and stationeries belonging to the defendant company, suggesting, it seems, that these items could well have been used to the detriment of the defendants. The other relates to the alleged admission by one Fung Foo Fook, apparently a director or former director of Greenworld that he had forged certain commercial documents such as invoices and delivery orders relevant to the transactions between the plaintiff and the defendants. In my view, such fresh evidence would, if true, have had a determining influence upon the decision of the learned Senior Assistant Registrar in this case. I am therefore satisfied that the other requirement under O. 56 r. 1(3A)(b) RHC has also been complied with.

In the circumstances and for the reasons given, I think it right and proper to admit the two affidavits in question for the purpose of this appeal.

I now come to the second relief sought for in the defendants' application in encl. 31 which is an application to amend their statement of defence dated 9 March 1998. The main ground relied on is that the amendment is necessary as a result of the specific averment of fraud or forgery by one Fung Foo Fook, a director or former director of Greenworld. In opposing the application for amendment, counsel for the plaintiff has submitted (i) that the amendment was not *bona fide* and (ii) that the amendment would change the character of the defence. Having regard to the affidavits filed herein and the circumstances involved, I find the grounds raised in opposition to be without merit. In this connection, I bear in mind the principles enunciated by the Federal Court in *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd* [1983] 1 CLJ 191; [1983] 1 MLJ 213. Therein, Mohamed Azmi, FJ said *inter alia*:

The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is *bona fide*; (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. If the answers are in the affirmative, an application to amend should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new course of action.

In the light of the established principles, I am satisfied that, having regard to all the circumstances, the amendment sought for will not cause any injustice to the plaintiff. The amendment is a necessary follow-up to the averment of fraud or forgery by one Fung Foo Fook. Such an amendment will not cause prejudice to the plaintiff.

For all the reasons stated, I will allow the application in encl. 31 and order in terms thereof.